Filed 11/16/10 P. v. Stuart CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. MARQUICE DESHAWN STUART, Defendant and Appellant.	B218397 (Los Angeles County Super. Ct. No. MA043799)

APPEAL from a judgment of the Superior Court of Los Angeles County. John Murphy, Commissioner; Thomas R. White and Jared Moses, Judges. Affirmed as modified.

Thomas Owen, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Chung L. Mar and Michael R. Johnsen, Deputy Attorneys General, for Plaintiff and Respondent.

This is an appeal from a judgment in a criminal case arising from an attack on one victim by lighting her on fire, followed by a knife attack on a bystander victim. At the end of a trial on six counts (including two counts of attempted murder), a jury convicted Marquice Stuart of one count of assault with a deadly weapon (the knife victim), and one count of arson causing great bodily injury and one count of aggravated mayhem (both as to the fire victim). In a bifurcated proceeding, the trial court found that Stuart had a prior serious felony conviction. The trial court thereafter sentenced Stuart to an aggregate term of 11 years to life in state prison. Stuart then filed the appeal that comes before us today. We reject Stuart's claims that his trial was tainted by juror misconduct, and that the evidence was not sufficient to support his aggravated mayhem conviction, and affirm the judgment.

FACTS

A. The Arson and Assault

On October 17, 2008, Stuart and his mother, Aundra Barnes, and Barnes's brother, Milton Coleman, and other relatives were together at a residence in Lancaster when Stuart and Barnes began arguing. Stuart became upset, grabbed a container of lighter fluid, and sprayed Barnes with lighter fluid. Stuart then pulled out a lighter and said, "Fuck you, bitch, I will light you up." Stuart advanced toward Barnes, they wrestled over the lighter, and Barnes caught on fire. Stuart and Barnes went to the kitchen to try dousing the fire with water. The two continued to argue. Stuart got a knife and asked Barnes if she wanted to die with him. They went into the living room, with Stuart still holding the knife. When Coleman walked into the living room, Stuart sliced Coleman in the neck with the knife.

Several officers from Los Angeles County Sheriffs' Department responded to the scene. Deputy Wesley Guthrie interviewed Barnes. The facts summarized above came from Barnes's statements to Deputy Guthrie. When Deputy Guthrie spoke to Coleman, he confirmed that Stuart had cut him with a knife. Barnes and Coleman both appeared intoxicated to Deputy Guthrie. Deputy Shannon Knight interviewed Stuart. According to Stuart, Barnes lit herself on fire. Stuart said he did not know how Coleman's neck had

gotten cut. Deputy Knight found a bloody knife from the kitchen counter; several witnesses identified it as the knife used to cut Coleman.

B. The Charges and Jury Trial

In November 2008, the People filed an information charging Stuart with two counts of attempted murder (victims Barnes and Coleman); assault with a deadly weapon upon Coleman; arson causing great bodily injury upon Barnes; aggravated mayhem upon Barnes; and, assault with caustic chemicals upon Barnes. The People further alleged that Stuart personally inflicted great bodily injury as to the attempted murder and assault counts. The information alleged that Stuart had a prior strike conviction for robbery in 1998, which also qualified as a prior serious felony conviction.

At a jury trial from late February through early March 2009, the People presented evidence establishing the facts summarized above — largely through testimony from the various deputies who had responded to the scene of the crimes. Barnes and Coleman and two relatives recanted their pretrial statements. Barnes testified she accidentally spilled the lighter fluid on herself while playing around, and that she had caught on fire when she dropped a cigarette on her shirt. Coleman said he had been drinking and taking Vicodin, that he had taken a knife from the kitchen for unknown reasons, and that he thought he cut himself when he tripped on a rug.

C. Jury Deliberations and Juror Number 10

The trial court submitted the cause to the jury near the end of the day on Thursday, March 12, 2009, at which time the court instructed the jurors that their only task for that day was to select a foreperson, and to advise the court whether they wanted to return the following morning or afternoon. The court thereafter admonished the jury, and they were excused until 1:30 p.m., the next day. On Friday, March 13, 2009 the jury resumed deliberations at 2:12 p.m. The court admonished the jury at 4:30 p.m., and ordered the jurors to return on Monday, March 16, 2009. On March 16, the jury resumed deliberations at 9:10 a.m. After returning from the lunch recess, the jury sent the following note to the trial court: "Juror [number] 10 is having trouble with the deliberation process and does 'not want to be here anymore.'" The court discussed the

note with the attorneys, and then spoke with jury foreperson outside the presence of the other jurors.[1] The court, in the presence of the parties questioned the foreperson. The court admonished the foreperson not to tell them how the jury was divided, or the substance of the deliberations. The foreperson explained that there had been a "struggle" in the deliberations, and Juror No. 10 participated "very little in that." The foreperson stated that Juror No. 10 told the others that he did not want to "hold them up" and to "put [him] down for what you want." The foreperson raised the issue with the court because Juror No. 10's decision-making would be called into question by that statement. The court inquired further about Juror 10's participation in the deliberations. In response to a question of the court, the foreperson explained that Juror No. 10 would only say "yes" or "no" and agree or disagree. Juror No. 10 would consistently state, "I need more." The foreperson stated that Juror No. 10 would not participate when things "were not going his way," but would state his agreement when the issues were going "that way." The court then inquired of the attorneys as to whether either side wished to question the foreperson. Both sides declined the opportunity to question the foreperson.

Shortly thereafter, the court called in the jury into the courtroom, admonished the jurors, and then ordered them to return at 9:00 a.m., the following morning, Tuesday, March 17, 2009. Before the jury resumed deliberating on Tuesday, March 17, the court re-instructed the jurors in accord with the standard instruction guiding deliberations. (CALCRIM No. 3550.) CALCRIM No. 3550 reminded the jurors to decide the case for themselves, but not to hesitate to change their mind if they become convinced that they were wrong. The jury deliberated a full day on Tuesday, March 17, 2009. During the afternoon of March 17, the jury submitted a question requesting clarification on the issue of "intent to commit murder." The court re-instructed the jury with the standard instruction on attempted murder, and received and answered questions submitted through

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[1] Commissioner John Murphy presided over Stuart's trial. At the time the jury submitted the note regarding Juror No. 10 on the afternoon of March 16, 2009, the Honorable Jared Moses was covering Commissioner Murphy's courtroom. The discussion we summarize took place between Judge Moses and the jury foreperson; the proceedings were transcribed for Commissioner Murphy's review.

the jury foreperson. At about 4:30 p.m., on March 17, 2009, the court admonished the jury, and ordered the jurors to return at 1:30 p.m., the following day. On Wednesday, March 18, 2009, the jury resumed deliberations at 1:40 p.m.

D. The Verdicts

At 2:55 p.m. on March 18, 2009, after over three days of deliberations, the jury found Stuart not guilty of the count of attempted murder of Barnes. The jury failed to return verdicts on the attempted murder of Coleman, and assault with caustic chemicals upon Barnes. It found Stuart guilty on three counts: assault with a deadly weapon upon Coleman;[2] arson with great bodily injury upon Barnes; and, aggravated mayhem upon Barnes. The court polled the jurors on the guilty verdicts on counts 3 (assault with a deadly weapon upon Coleman), 4 (arson causing great bodily injury upon Barnes) and 5 (aggravated mayhem upon Barnes). Juror No. 10, as well as every other juror, individually confirmed that "guilty" was his or her verdict. This proceeded three times because of the three guilty verdicts. Each time Juror No. 10 re-affirmed that the verdict was his individual verdict.

E. Stuart's Motion for New Trial

On May 15, 2009, Stuart filed a motion for new trial, and a motion for disclosure of juror information. Stuart's motions were supported by a declaration from a defense investigator who stated that he had spoken with Juror 10. According to the investigator, he had "interviewed Juror #10 *regarding his opinion of the trial process and his decision on the verdict*." (Italics added.) According to the investigator, Juror No. 10 stated that he originally felt that there was no point in hearing the case because the victims were contradicting the prosecutor's assertions. Juror No. 10 explained that the issue between the jurors had been the element of intent. Juror No. 10 was uncomfortable determining the mental state of the defendant. After stating that he believed that the crime did happen, Juror No. 10 stated that if he were the sole juror who had to decide the outcome, "he had reasonable doubt, [and] he would have found the defendant not guilty."

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[2] The jury found "not true" the personal infliction of great bodily injury enhancement attached to this count.

F. Hearings on the Motion for New Trial

At a hearing on June 4, 2009, the trial court advised the lawyers that it was going to write the foreperson and Juror No. 10 explaining that the parties sought disclosure of their personal identifying information. The court informed the parties that it would track the language of Code of Civil Procedure section 237, notifying the jurors that could object to their information being disclosed. Both jurors subsequently objected to the release of their information. On July 6, 2009, the court ruled that it would not disclose the jurors' information over their objections.

At a hearing on August 11, 2009, the trial court heard Stuart's motion for new trial. Counsel for Stuart did not argue, but rather "submitted on the paperwork." The prosecution then argued briefly. After hearing the prosecution's argument, the trial court agreed with the prosecutor that Stuart's motion for new trial court not be granted on the basis of hearsay evidence alone, and denied the motion.

The trial court thereafter found the prior serious felony conviction allegation to be true, and sentenced Stuart as noted above.

Stuart filed a timely notice of appeal.

DISCUSSION

I. Motion for New Trial Based on Juror Misconduct

Stuart contends all of his convictions must be reversed because the trial court did not hold an evidentiary hearing on his motion for new trial based his claim of juror misconduct.[3] More specifically, Stuart contends the court should have subpoenaed at least two jurors to attend a hearing on his motion for new trial, where they could be examined about possible juror misconduct. We decline to reverse on the "no hearing" claim raised by Stuart.

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[3] We have chosen to address the hearing issue first. We will then address whether, on the given record, the trial court properly denied Stuart's motion.

A. The Governing Legal Principles

When a jury renders a verdict against a defendant, the trial court may, upon his or her application, grant a new trial upon a showing of "any misconduct by which a fair and due consideration of the case has been prevented." (Pen. Code, § 1181, subd. (3).) A trial court may not grant a new trial motion based solely upon a hearsay declaration (*People v. Hayes* (1999) 21 Cal.4th 1211, 1256), nor upon evidence other than evidence showing "objective facts" or "overt acts" — i.e., statements, conduct, conditions or events open to sight, hearing, and the other senses, and, thus, subject to corroboration. (*In re Stankewitz* (1985) 40 Cal.3d 391, 398.) In other words, a trial court may not grant a new trial based on evidence of a juror's thought processes. (*People v. Hedgecock* (1990) 51 Cal.3d 395, 418-419 (*Hedgecock*).)

Apart from the prohibition against inquiring into jurors' thought processes, a hearing on a motion for new trial may not be used as a "fishing expedition" to search for possible misconduct, but should be held only when the defense has proffered evidence demonstrating a strong possibility that prejudicial misconduct has occurred. (*Hedgecock*, *supra*, 51 Cal.3d at p. 419.) The trial court has discretion to determine when an evidentiary hearing is necessary to resolve material, disputed issues of fact. (*Id*. at p. 415; *People v. Avila* (2006) 38 Cal.4th 491, 604.)

B. Failure to Grant an Evidentiary Hearing

The trial court did not abuse its discretion by denying an evidentiary hearing on Stuart's motion for new trial. Here, there were no disputed issues of fact. This is not a case, as Stuart's arguments suggest, where "conflicting" evidence of juror misconduct required a factual resolution. Even assuming that Juror No. 10 made the statement to the investigator, those statements did not create any disputed factual issues warranting a hearing. Moreover, neither party requested that Juror No. 10 be subpoenaed to court. Thus, the trial court did not abuse its discretion in failing to grant an evidentiary hearing.

C. Denial of Defendant's Motion for New Trial

Stuart contends that all three of his convictions must be reversed because — even in the absence of an evidentiary hearing and any additional presentation — the trial court erred when it denied his motion for new trial. We see no evidence of juror misconduct in Stuart's case. (*People v. Avila, supra,* 38 Cal.4th at p. 604; and see also *Hedgecock, supra,* 51 Cal.3d at pp. 415, 419.)

First, we conclude there was no competent evidence tending to suggest that any juror had engaged in misconduct. The investigator's declaration relaying Juror No. 10's post-trial comments were plainly hearsay, and there was no exception approving its admissibility to prove misconduct. Second, even in the event Juror No. 10's comments were admissible under hearsay rules, and accepted at face value, his comments were otherwise inadmissible because they demonstrated only evidence of Juror No. 10's mental processes. Juror No. 10's comments were a quintessential display of a juror's mental thought processes; he stated his view on what he determined to be the strengths and weaknesses of the prosecution's case; he stated his belief that there was something odd about prosecuting a person where the victims had recanted their initial accusations; he admitted he had struggled with the concept of criminal intent. Such thought process evidence is prohibited by Evidence Code section 1150. (*Hedgecock, supra,* 51 Cal.3d at pp. 418-419.)

Indeed, at best the comments show only that he had second-thoughts about his vote to convict Stuart, but this is not sufficient to disturb the jury's verdicts. Three times Juror No. 10 was asked whether the verdicts represented his individual verdicts. Three times Juror No. 10 responded affirmatively. Misgiving cannot form the basis for a motion for new trial based upon juror misconduct. Indeed, the mental process of jurors cannot be used to impeach their verdict based upon claimed misconduct. (See *People v. Peavey* (1981) 126 Cal.App.3d 44, 49-50 [statement by juror that she believed defendant was not guilty but voted guilty because other jurors did so demonstrated inadmissible subjective considerations of juror]; *People v. Stevenson* (1970) 4 Cal.App.3d 443, 445 [juror's affidavit that had he known his vote for not guilty would have resulted in hung

jury he would have changed his vote was inadmissible because it showed mental process of juror].) Moreover, none of the authorities cited by Stuart support his proposition that evidence of a juror's post-trial misgivings tends to show the existence of misconduct during the deliberative process. The very purpose of Evidence Code section 1150 is to prevent such challenges, which would undoubtedly undermine the "stability of verdicts." (See, e.g. , *People v. Hutchinson* (1969) 71 Cal.2d 342, 350.) We are confident in finding that, if evidence of the nature disclosed in Stuart's current case were allowed to challenge a verdict on the ground of juror misconduct, then no jury verdict would be safe from challenge. In short, we simply reject Stuart's proposition that Juror No. 10's comments showed that he violated his oath as a juror.

Further, the foreperson's statements mid-deliberation do not persuade us that Juror No. 10 engaged in misconduct. As a framework for examining this issue, there is no legally mandated single style of conduct imposed on a juror for deliberating a case. We see no evidence of juror misconduct in the foreperson's complaints that Juror No. 10 did not say much during deliberations. Juror No. 10 agreed or disagreed with various positions, and did not speak when he did not agree with the discussion. He requested more evidence, stating "give me more." Contrary to Stuart's assertion, this behavior shows a juror who is participating in deliberations but simply disagrees with the majority. (See, e.g., *People v. Castorena* (1996) 47 Cal.App.4th 1051, 1066.) This behavior is consistent with the trial court's instruction, CALCRIM No. 3550, seeking the individual opinion of each juror.

Finally, the foreperson's complaint that Juror No. 10 stated that he no longer wished to be "there" and that the other jurors should just "put him down for what [they] want[ed]" does not demonstrate misconduct. This statement might constitute misconduct if it were corroborated by conduct consistent with the statement. In this case, the trial record defeats the possibility of such a conclusion. Although it is correct that the jury foreperson expressed concerns about Juror No. 10 during the jury's deliberations, that event occurred mid-way through the deliberations, and the trial court addressed the potential problem by re-instructing the jurors on the manner of deliberations. The jury

thereafter continued deliberating for an additional one and one-half day. During that time, the jury submitted a note: one requesting clarification of intent on the attempted murder counts. The jury submitted no notes regarding Juror No. 10. The record also establishes that neither Juror No. 10, nor any other juror, simply voted with other jurors as an accommodation. The verdicts corroborate this conclusion. Six counts were submitted to the jury; the jury convicted Stuart of only three counts. The two most serious counts — the attempted murder counts — were rejected by the jury; one by express acquittal, and the other by hanging by a vote of 10-2 in favor of not guilty. The jury hung 8-4 on the assault with caustic chemicals. When thrice polled, each of the jurors, including Juror No. 10, confirmed their decision to convict Stuart of assault, arson and mayhem. The record does not support a conclusion that any juror was simply "going along with the others." We cannot, on the record before us, declare that the trial court acted arbitrarily or unreasonably in denying Stuart's motion for new trial.

II. Aggravated Mayhem

Stuart contends his conviction for aggravated mayhem must be reversed because it is not supported by substantial evidence. We disagree.

Under the substantial evidence test standard of review, we may not substitute our assessment of the evidence in place of the jury's assessment of the evidence, but rather, we view the evidence in the light most favorable to the judgment, to determine whether there is credible, solid evidence from which the jury could have found each element of the crime beyond a reasonable doubt. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Jones* (1990) 51 Cal.3d 294, 314.)

A person is guilty of aggravated mayhem when he or she — under circumstances manifesting extreme indifference to the physical or psychological well-being of another person — intentionally causes permanent disability or disfigurement of the other person or deprives the other person of a limb, organ, or member of his or her body. (Pen. Code, § 205.) For purposes of the aggravated mayhem statute, it is not necessary to prove that the defendant intended to kill (*ibid*), but it is necessary to prove that he or she harbored a

specific intent to cause a maiming injury. (*People v. Ferrell* (1990) 218 Cal.App.3d 828, 833 (*Ferrell*); *People v. Park* (2003) 112 Cal.App.4th 61, 63.)

Stuart contends the evidence does not support the jury's necessary finding that he had the specific intent to maim. Instead, argues Stuart, the evidence showed at most that he committed an "indiscriminate attack." Stuart compares the facts in his case to the facts found in *People v. Sears* (1965) 62 Cal.2d 737 (*Sears*), *People v. Anderson* (1965) 63 Cal.2d 351 (*Anderson*), and *People v. Lee* (1990) 220 Cal.App.3d 320 (*Lee*). He distinguishes the facts of his case from those in *Ferrell, supra*, 218 Cal.App.3d 828. We find the facts in Stuart's current case stand apart from *Sears*, *Anderson*, *Lee* and *Ferrell*, and are sufficient, on their own, to support the jury's aggravated mayhem verdict.

The issue in *Sears, supra*, 62 Cal.2d 737 was whether the trial court had properly instructed on a felony murder mayhem theory. The Supreme Court ruled no, on the ground that the evidence did not support the predicate mayhem offense. In *Sears*, the victim died from a knife wound to the jugular vein; the defendant had also hit her several times with a steel pipe. The victim suffered upwards of 60 wounds. The Supreme Court found this evidence sufficient to show an "indiscriminate attack," but not an intent to maim. *Anderson, supra*, 63 Cal.2d 351, likewise involved the issue of whether a trial court had properly instructed on a felony murder mayhem theory, and, again, the Supreme Court ruled no, again on the ground the evidence did not support the predicate mayhem offense. There, the victim died from lacerations of the lung; she had suffered 41 wounds ranging over the entire body from the head to the extremities. In *Lee, supra*, 220 Cal.App.3d 320, the court directly addressed the sufficiency of the evidence in support of an aggravated mayhem verdict; the court reversed because the evidence showed no more than the defendant had punched and kicked the victim. *Ferrell, supra*, also addressed the sufficiency of the evidence in support of a jury's aggravated mayhem verdict; the court affirmed, finding that the defendant's act of shooting the victim once in the neck, "from short range," was sufficient for the jury to have found that the defendant intended to disable the victim permanently.

We find it unhelpful to compare and contrast *Sears, Anderson, Lee and Ferrell*. In our view, it is the very nature of Stuart's crime — lighting his mother on fire — that supports the jury's aggravated mayhem verdict. Where the evidence shows a defendant sprayed his victim with lighter fluid, and stated, "Fuck you, bitch, I will light you up," and then advanced on his victim with a lighter, a jury reasonably could find an intent to permanently disfigure the victim. For purposes of the substantial evidence test, it is irrelevant whether another jury might reasonably have found no intent to disfigure, nor is it our role to sit in judgment of the facts. (*People v. Kwok* (1998) 63 Cal.App.4th 1236, 1245 [intent is rarely susceptible of direct proof, and may be inferred from all the facts and circumstances shown by the evidence].)

III. Custody Credit

Stuart contends, the People concede, and we agree that Stuart is entitled to 44 days of presentence custody credit. A defendant who is convicted of a violent felony within the meaning of Penal Code section 667.5, subdivision (c), is limited by Penal Code section 2933.1 to custody credit calculated at 15 percent of his or her actual presentence days of custody. In Stuart's case, he was in actual presentence custody for 299 days, which, calculates into 44 days of presentence custody credit (299 x .15 = 44). We agree with Stuart and the People that the trial court should not have applied Penal Code section 2933.5 to deny credit because the court did not make findings on the requisite disqualifying factors for application of the section.

DISPOSITION

The trial court is directed to prepare a corrected abstract of judgment reflecting that Stuart is entitled to 44 days of presentence custody credit. The corrected abstract shall be forwarded to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

O'CONNELL, J. *

We concur:

RUBIN, Acting P. J.

FLIER, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.